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A COMPARATIVE ANALYSIS OF CHILD RIGHT TO EDUCATION IN INDIA, GERMANY, AND THE UNITED STATE OF AMERICA

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Abstract

The right to education is universal, but girls continue to suffer severe disadvantage and exclusion within education systems in many countries. Gender disparity begins in early childhood and is present at all stages of girls' lives, impacting negatively on their access to education. Children miss out on school because their families need them to earn money. But by sacrificing their education, they become trapped in a cycle of poverty. Many countries, particularly developing countries, face an acute shortage of qualified teachers. Even though schooling is largely financed with public resources across the globe, a great deal of heterogeneity is observed between countries and world regions. The study employs a doctrinal method of research where the study is to identify and assess the right to education of children in India, the USA, and Germany, and whether an acceptance of a universal right to education can lead to the benefits of economic efficiency and improvements in social welfare. The structure and stability of education can give children, their families, and communities resilience and hope for the future. Uneducated children are vulnerable to a future of poverty and violence and lack the more complex skills needed to contribute to their society's reconstruction and development. The present study will address the following issues such as Are there any international laws enacted for the protection of the rights of child education and if yes, how do the laws contribute to increasing awareness regarding the rights of child education? What are the laws, and policies that govern the right to education in these three countries? What steps should India, the USA, and Germany follow to enhance the educational system and right to education? Hence, the study is undertaken to understand the implementation of the right to education in aforesaid countries.

Keywords: *Child right to education, Education system, literacy, comparative education system.*

1.0 PROLOGUE

Education is widely accepted to be a fundamental resource, both for individuals and societies. Indeed, in most countries basic education is nowadays perceived not only as a right but also as a duty – governments are typically expected to ensure access to basic education, while citizens are often required by law to attain education up to a certain basic level.¹ Literacy is a key skill and a key measure of a population's education. UNESCO (United Nations Educational, Scientific and Cultural Organization) operationalizes the measurement of literacy as the ability to both read and write a short, simple statement about one's own life. Literacy rates are determined by literacy questions in a census or sample survey of a population, in standardized tests of literacy, or via extrapolation from statistics about school enrollment and educational attainment².

While the earliest forms of written communication date back to about 3,500-3,000 BCE, literacy remained for centuries a very restricted technology closely associated with the exercise of power. It was only until the Middle Ages that book production started growing and literacy among the general population slowly started becoming important in the Western World³.

While the ambition of universal literacy in Europe was a fundamental reform born from the enlightenment, it took centuries for it to happen. Even in early-industrialized countries, it was only in the 19th and 20th centuries that rates of literacy approached universality from a historical perspective, the world went through a great expansion in education over the past two centuries.

1.1 QUALITY OF EDUCATION

Increases in the quantity of education – as measured for example by mean years of schooling – have, for a long time, been the central focus of policymakers and academic debate. While an increase in education is important, the actual goal of providing schooling is to teach skills and transfer knowledge to students in the classroom. This implies that the quality of education is important rather than the quantity of education.

1.2 QUALITY EDUCATION – SUSTAINABLE DEVELOPMENT GOAL NUMBER VI

Children from the poorest households are four times more likely to be out of school than those of the richest households. Disparities between rural and urban areas also remain high. Achieving inclusive and quality education for all reaffirms the belief that education is one of the most powerful and proven vehicles for sustainable development. However, quality education is one of 17 Global Goals that make up the 2030

¹ "Compulsory Education", New England Journal of Education.

² UNESCO 'Recommendation Concerning the International Standardization of Educational Statistics', Records of the General Conference, tenth session, Paris, 1958: Resolutions

³ An overview of the academic literature on the historical origins and spread of literacy can be found in Easton, P. (2014), Sustaining Literacy in Africa: Developing a Literate Environment. United Nations Educational, Scientific and Cultural Organization, Paris, France

Agenda for Sustainable Development. Without it, many children remain trapped in a life of poverty and hardship⁴. Across the world, 200 million young people leave school without the skills they need to thrive, plus an estimated 775 million adults – 64 percent of whom are women – who lack the most basic reading and writing skills⁵, This shortfall will rise to 3.3 million by 2030 based on population projections⁶

1.3 RIGHT TO EDUCATION

The right to education is universal, yet girls continue to suffer severe disadvantage and exclusion within education systems in many countries. Gender disparity, which begins in early childhood and is present at all stages of girls' lives, impacts negatively on their access to education. Access to sanitation – such as private and separate latrines – as well as negative classroom environments, where girls may face violence, exploitation, or corporal punishment, can affect a girl's chance of an equal opportunity to learn.

Adolescent girls also face economic and societal demands that further disrupt their education, such as household obligations, child labor, and early marriage. One-third of girls in the developing world are married before the age of 18, and one-third of women in the developing world give birth before the age of 20. Educating girls is essential to achieving sustainable development. Education can empower women to overcome gender discrimination so that they can make more informed choices about their lives. Education improves an individual's chances in life and helps to tackle poverty.⁷

In the light of the above discussion right education means; Every person is entitled to quality education without discrimination, which means:

- A compulsory free primary school education for every child
- Secondary school (including technical training) must be available to everyone - states must work towards providing this for free
- Higher education must be equally accessible, with countries working towards the goal of making this free
- Fundamental education for those who missed out on primary school should be encouraged and available⁸

It also means parents have the right to choose schools for their children and individuals and organizations to set up schools that meet minimum standards.

2.0 COMPARATIVETIVE DELIBERATION

Education is the process of facilitating learning, or the acquisition of knowledge, skills, values, beliefs, and habits. Educational methods include teaching, training, storytelling, discussion, and directed research. Education frequently takes place under the guidance of educators; however, learners can also educate

⁴ UNESCO (2011) "[The hidden crisis: armed conflict and education](#)" accessed on June 16, 2022.

⁵ UNESCO (2013), "The Global Learning Crisis"

⁶ UNESCO (2013) "A Teacher for Every Child"

⁷ Awasthi S.K. and Kataria R.P. (2006), Law Relating to Protection of Human Rights, Orient Publishing Company,

⁸ Article 26 of The Universal Declaration of Human Rights

themselves. Education can take place in formal or informal settings and any experience that has a formative effect on the way one thinks, feels, or acts may be considered educational. The methodology of teaching is called pedagogy. Formal education is commonly divided formally into such stages as preschool or kindergarten, primary school, secondary school, and then college, university, or apprenticeship. A right to education has been recognized by some governments and the United Nations.⁹ In most regions, education is compulsory up to a certain age. There is a movement for education reform, and in particular for evidence-based education.

All children have the right to go to school and learn, regardless of who they are, where they live, or how much money their family has

Quality learning requires a safe, friendly environment, qualified and motivated teachers, and instruction in languages students can understand. It also requires that learning outcomes be monitored and feedback into instruction.

In 144 countries around the world, UNICEF works to provide learning opportunities that prepare children and adolescents with the knowledge and skills they need to thrive

Key areas of their work in education include:

- Access: Gender-equitable access to quality education from early childhood to adolescence, including for children with disabilities, marginalized children, and those living in humanitarian and emergency settings
- Learning and skills: Quality learning outcomes and skills development that come from strong education systems and innovative solutions
- Emergencies and fragile contexts: Improved learning and protection for children in emergencies and on the move

The lesson of the learning crisis is clear: Business as usual is not improving learning outcomes. A new, more radical approach that focuses on enhancing learning is long overdue and forms the basis of UNICEF's global education strategy.

To build a world in which every child learns, UNICEF will increasingly promote equity and inclusion. This includes making targeted efforts for children who are excluded on the basis of gender, disability, poverty, ethnicity and language, as well as those who are displaced or affected by emergencies.

As efforts to realize the Sustainable Development Goals accelerate, UNICEF is expanding education systems to capture the children most at risk. It forges partnerships with key development organizations, like the Global Partnership for Education, the Global Education Cluster and the United Nations Girls' Education Initiative, to advance the strategic plan and create a world where every child learns.

⁹ Article 13 of the United Nations' 1966 International Covenant on Economic, Social and Cultural Rights recognizes a universal right to education. *ICESCR*, Article 13.1.

In collaboration with the UNESCO Institute for Statistics, UNICEF launched the Out-of-School Children Initiative (OOSCI) in 2012, aiming to make a substantial and sustainable reduction in the number of out-of-school children worldwide by providing partner Governments with actionable data. OOSCI identifies barriers that lead to exclusion and develops proposals for policies and programs that put more children in school, on track to complete their education. Over 90 countries have joined the initiative since its launch, many of whom rely on OOSCI data to forge education sector plans. As various countries have accepted that it is the right of a child to education, this chapter analyzes the rights of child education in USA, Germany, and India.

2.1 INDIAN EDUCATION SYSTEM

The official public school system starts with Primary School. A child has to complete 5 years to go to Primary School (1st Class to 5th Class). After primary school, the child has to go to Upper Primary & Secondary School (6th to 10th). After Secondary School (SSC), the students go to Junior College (1st & 2nd Year Intermediate i.e. 11th and 12th). After Junior College, students go to Degree College (3 Years), PG (2 Years), Ph.D and Post Doctoral.

Unlike the US, students in India chose their Courses not by interest, but on the basis of job opportunities available in the market. For example, if there are more job prospects in the computer field, most of them run for computer courses, burying their interest which they had in other subjects. Thus, people in India have to suppress their interests or develop them personally on their own. Moreover, in India in most of the Universities/ Colleges there are no Campus jobs.

2.2 AMERICAN EDUCATION SYSTEM

The official public school system starts with Kindergarten. In most states, a child has to complete 5 years to go to Kindergarten. After Kindergarten, child has to go 1st grade, then 2nd grade and so on until 12th grade. Some public schools offer a Pre-Kindergarten as well. This is not a formal education level. In some schools, Pre-Kindergarten is meant for poor children, homeless kids, kids who cannot speak English etc. The pre-kindergarten is generally meant to prepare the backward children to get ready for formal education next year. After 12th grade, UG (4 years), MS (PG - 2 Years), Ph.D. and Post- Doctoral.

On the contrary to India, in US no one would say that I am interested only in a particular Course. Generally all people have some interests in different areas like music, dance, physics, economics, history, geography, psychology, philosophy, astronomy, etc. In US, they can take a few courses in the areas in which they are interested – which facilitates "learning what you want to". All people would not run behind a few particular courses. Unlike this, in India most of the people are mad of doing a few particular courses like medicine or engineering. In US, bright people are spread out in different majors (Courses) and brightness is rooted in interest and not as a necessity. In the US, effort is made to make a course easy to the student i.e. student concerns are taken into account while designing the course, because of the philosophy of not to unnecessary trouble a person. This might lead to easier undergraduate courses. Since they have choice of course selections atleast as early as the 9th grade - so many people don't take all fundamental courses - some people avoid courses they hate like maths, geography etc. This is a demerit in US education system.

More social activities on campus - more parties, more clubs (want to fly a plane? join the flying club at University Campus), more facilities like the Gym, having friendships with people in different majors (major field of study) giving a broader perspective of life in general, opportunity to participate in totally different activities like writing for the college student newspaper, etc. All these develop a better well rounded individual. The quality of life in general in the US is high and there are lots of facilities and infrastructure for the people who really want to learn

2.3 PUBLIC SCHOOLS IN USA AND INDIA:

In most states in USA, government offers free education to children through public schools operated by government. There is no fee in such schools. Schools are funded by the government through the taxes collected by federal/state/county/city governments. A significant portion of the taxes from residents goes to the school/education fund. Unlike the government schools in India, the public schools in USA are well maintained and managed. Most schools get a lot of government fund and so provide great infrastructure. There are several educational programs organized and funded by various educational boards for the benefit of the children. Academic programs for each school are defined by the state board of the respective states.

Public schools are free in both USA and India. However, the Indian government schools are not preferred schools for most people due to the lack of infrastructure and committed management. Most government schools in India have poor infrastructure and facilities. Teachers are usually qualified, but since only children with poor academic background and family background choose government schools in India, teachers eventually lose interest.

2.4 PRIVATE SCHOOLS IN USA AND INDIA

There are several private schools in USA, which offer a similar education like public schools. Private schools require heavy fees from students to meet the huge expenses in running the school. However, in many cases, private schools cannot compete with the infrastructure and programs offered by public schools in USA. There are several well known private schools in USA which are very famous and attract the cream layer of the talented students.

2.5 PRIVATE SCHOOLS ARE CHOSEN BY PARENTS FOR MANY REASONS

- 1. Social status:** Some parents choose posh private schools to show their social status.
- 2. Racial reasons:** Some parents may not like their kids to go to certain public schools due to racial reasons. This may or may not be for racial discrimination or could be other social reasons.
- 3. Public school may not be good:** Kids can go to only designated public school and they cannot choose which public school they can go. For some reasons, if the parents/children do not like their public school, their options are limited to going to a private school of their choice.

4. Academic standard: In some areas, public schools may not offer good education or the infrastructure of the building may be poor. In such cases, parent would choose private schools.

5. Convenience: If public schools are too far and there are private schools at very convenient location (like near the work place of parents), they would choose private schools.

6. Religious Education: Lot of parents wants to give religious education to their children. There are hundreds of Christian schools in USA, which focus on Christian as well as value based education. In general, such religious schools offer relatively low fees.

2.6 HOME SCHOOLING IN USA VERSUS INDIA

This is another form of common education system in USA. As the name says, in this form of education, kids will not go to any school. Rather, a parent or a tuition teacher will teach the students at home itself. There is no formal timetable, but in most cases, parents would define a timetable for the kids at home schooling. In home schooling, parents can teach the kids at the pace they want and they can. They can give individual focus to the needs of their children. In case of super smart kids, they can teach a lot and cover a lot of syllabus than the formal school. In case of children who need special attention and care, they can go at a slow speed giving proper care to the needs of the child. Most parents purchase educational material, books and syllabus and follow the formal process at home. One of the main disadvantages of homeschooling in USA is, kids will lack social skills. They do not get many opportunities to interact with other kids. To overcome this problem, parents will form groups with other parents involved in home schooling and then arrange group discussions and activities at scheduled time in various locations like public libraries and parks.

2.7 STRESS ON THE STUDENTS IN INDIA AND THE FLEXIBILITY OF THE AMERICAN EDUCATION SYSTEM

The basic and most important difference between the two educational systems is the stress on the students in India at the primary and high school level itself. The Indian education and social systems are very hard on kids and completely ignore their feelings, opinions and ambitions. Kids are pushed to study from the age of 3 and non-performers are treated as dolts and ostracized by parents and society. The preferred choice of learning and teaching is memorizing. The memorization approach to study does not allow and teach kids to think independently. On the other hand, the flexibility of the American education system is its greatest strength. Students can choose among a host of classes and courses in high school and college. This means they can change their major (i.e. field of study) midway through college. This usually means that students in the US receive more exposure to a variety of subjects and hence, are more aware of their career options and opportunities. The American school system lays stress on individual ability development and encourages kids to express themselves and their opinions from an early age. As a result, most Americans are way better at getting their point across as compared to people from other countries

2.8 STUDENTS IN THE US WHO ARE MORE OUT-SPOKEN, WHEN COMPARED TO STUDENTS IN INDIA

Students in the US who are more out-spoken do well in class and outside class too only because they are more effective speakers. In the Indian system, individuals' speaking is only done with the teacher one-on-one during "oral" examinations, where students are asked questions on the subject matter. While students in the US build more self-confidence and are much better at public speaking. Classroom discussion and asking questions to the professors are encouraged. Indian students on the other hand find it hard to learn to speak up or express their opinions. Professors expect to treat them like God and often use their almost dictatorial powers against students who upset them in some way. American education (high school and college) system is designed so as not to reduce/hurt the self-esteem of any kid in class. It is designed in such a way that nearly everyone can pass the high-school level. On the other hand, most Indian children fear failure in each class.

2.8.1 Trained/Certified teachers

In India it is very common for teachers at all level (primary through high school) to have obtained their undergraduate degree. In addition, teachers needed to be specifically trained in a particular teaching training programme i.e. by joining Teaching Training Course (TTC) or Bachelor of Education (B.Ed) after passing entrance test for the concerned course. In the United States, according to the No Child Left Behind Act (NCLB) which went into effect during 2002-03, teachers who teach core academic subjects are required to be "highly qualified." The law defines a highly qualified teacher as an individual who

- Has obtained full state certification;
- Holds a license to teach in the state;
- Has not had certification or licensure requirements waived on an emergency, temporary or provisional basis.
- In addition, there are requirements for demonstrating subject-matter knowledge that varies depending on what grade level an individual is teaching, and whether he/she is new to teaching or is a veteran teacher.

The "highly qualified" teacher requirements do not apply to all individuals, such as supplemental service providers and charter school teachers, who teach public school students. It is common that para-professionals are not being provided with the range of options necessary to demonstrate that they are qualified, nor the financial support necessary to meet the requirements. Often in private school settings, teachers are exempt from needing to be fully licensed or are given a few years leeway to obtain their license. Therefore, there is a vast difference in being "highly qualified" in India, than in the United States.

2.8.2 Role of the Family, Teachers and Society:

Indian families take education very seriously and believe that a solid education is the key to success in life. While many American families certainly share the same sentiments. But, the American education system is designed according to maintaining students' high self-esteem. Therefore, nearly everyone in the class will pass so long as 'feelings' aren't hurt and the teacher is not looked upon as doing an inefficient job in his/her classroom; regardless of what the actual students' proficiency levels are in that subject area. Instead of pushing the students harder to achieve beyond their current potential, teachers often "dumb down" the subject material to ensure that students' grades remain high. On the other hand, most Indian children have the fear of failure in the classroom and push themselves to work harder and longer by being self-motivated. This is also true of their parents and teachers, as school administrators pride themselves on being able to recruit new batches of students based on the academic achievements of outgoing classes

2.8.3 Mathematics

Mathematics develops logical and rational thinking; it lays the foundation of independent and lateral thinking. Indian schools start teaching maths, like multiplication tables, at the elementary level itself. It is given a lot of importance and is a must for students who plan to do science related study in college. On the other hand, high school in America is so flexible that a lot of students who end up majoring in sciences in college do not take advanced maths and calculus in high school. This emphasis on maths in high schools and engineering programs is also the reason why India produces so many "good" software engineers. This is one of the main reasons why most of the graduate students in computer science in the US are foreign students.

2.8.4 Curriculum

Indian education curriculum, for example, the curriculum for class IX, in India, builds on the things a student learned in class VIII. This is not necessarily true in the US curriculum. In US, for class they say grade.

2.8.5 Extra-curricular activities

In America, parents and school systems place a strong emphasis on extra-curricular activities and pour vast amounts of funding and resources into giving their children and students the best experiences in athletics, fine arts and social clubs. While these extra-curricular activities are necessary, however, in India, the focus remains on academics, as Indian parents, teachers and administrators realize that it is by getting good grades and high scores on tests, that children will go on to becoming successful adults. Instead of investing in private athletic coaches or additional gym time, Indian parents place the priority on investing in tutors to accelerate their child's learning. Tutors are used to help their children excel in a subject area, not just for remedial work

2.8.6 College Education System

The American college education system is industry-oriented and hence, is structured so that it produces people who can do a certain type of job efficiently. So it is like a custom-design factory which produces engineers/workers who can do one or two jobs very well but require massive retraining if they have to do something new. In contrast, the education in India is more towards teaching the basic concepts and a broader mass of information. The products of this education system are therefore capable of taking up several different types of jobs and are not masters of any single job. To do any single job well, they have to go through some amount of training at work. In USA, students are always being told to read something, do some assignment and essentially, being given goal-oriented tasks to perform, works great when students are being trained to work in the industry. And this is an admirable goal - America is built on the strength of these students who can perform what they have been told to do. However, in the long run, these people are not able to adapt quickly to changes in the industry. And they are definitely not prepared to go to graduate school i.e., for a master's degree or a Ph.D.

Graduate school is very different from undergraduate school. There is no single book being followed; the reading and writing assignments require paper chases and are ambiguously defined. Also, most courses do not have regular evaluations such as quizzes etc. but rely on a final project or term paper - this makes it very hard for one to know how much effort one needs to put into the course. One has to come out of the "spoon feed me" mode and learn to think independently. This lack of spoon feeding in graduate school also means that one has to be motivated by themselves - especially in PhD programs. The amount that got out of master's or PhD depends on the amount of work put in (more work also means faster graduation). There is no one motivating to work harder or checking on progress regularly. This is the situation described for public universities in the US. But, private liberal arts universities provide much better personalized attention to students besides a broader education. Also, non-science programs are stronger in general in the US due to the fact that they follow regular quarter or semester systems. In India, on the other hand, though semester system is prevailing most of the university students waste their whole year doing nothing; attendance requirements are very low and usually can be bypassed.

2.9 SYSTEM OF EDUCATION IN GERMANY

The higher education institutes in Germany are highly acclaimed and accredited. According to the Academic Ranking of World Universities (ARWU), 6 of the top 100 and 18 of the top 200 universities worldwide are German¹⁰. Three types of higher education institutes are present in Germany, which are:

¹⁰ Hashimy, S.Q. (2022) Cultural Horizon of Indian foreign policy: A cursory glance on ICCR, https://www.researchgate.net/publication/359906129_Cultural_Horizon_of_Indian_Foreign_Policy_A_Cursory_Glance_on_ICCR . SSRN Electronic Journal . Available at: https://www.researchgate.net/publication/359906129_Cultural_Horizon_of_Indian_Foreign_Policy_A_Cursory_Glance_on_ICCR (Accessed: September 6, 2022).

- **Technische Hochschule** (Technical higher education schools): These higher education schools pay emphasis on the traditional form of education. Usually, these institutes teach subjects such as science, engineering, and technology.
- **Fachhochschulen** (Universities of applied sciences): These institutes offer courses that focus on practical training related to business, design, economics, and the social sector.
- **Kunsthochschulen** (Colleges of art and music): These colleges offer creative and artistic programmes such as music, fine arts, fashion designing, and film-making.

Free education in Germany is available for German residents studying in public colleges and universities. This is because Germans believe that education should not be considered a commercial product and that free education helps in the economic growth and welfare of the country. This offer is also open to international students, but in order to avail this, they must possess German language proficiency.

Master's programmes in Germany are either consecutive or non-consecutive. Consecutive master's programmes follow on from a related undergraduate degree and usually do not cost much in terms of fees. On the other hand, non-consecutive programmes are focused on specialised areas of study. These programs charge fees and some universities even require professional experience as eligibility criteria.

In Germany, schools are required to develop the quality of education based on the framework established in most of the federal states (Länder). The quality and effectiveness of schools are very important.¹¹ The German education system has a federal configuration, that is, each of the 16 Länder, or federal states have its own education system with his own ministry, the Ministry of Culture. Only framework legislation for the university level is competence of the federal State; for everything else the federal states are competent. Although recently voices have called for a more centralized educational system and one can say that will probably not give the states sovereignty on education so easily for greater standardization. An advantage of this "collage of small states" as it has been called critical tone federalism is certainly the fact that the various projects and developments can be observed in different states first before applying them nationally. Early childhood education in Germany is not mandatory and is not very widespread. It is poorly regulated and, to date, no lesson plans for childcare, or guidelines for preschool (before attending the first grade). The requirements of the authorities have a very general nature and are not binding. A consequence of alarming reports by primary school teachers and also because of the bad results of PISA, is now intended to kindergartens and preschools become more integrated in the educational system to provide a good start to groups disadvantaged. However, critics warn of the danger of "losing childhood," and are carrying out further studies in psychology and pedagogy to find ways to combine games and learning. One can say that early childhood education is of social nature of 0-6 years. Another way was found that appears after 5 years of infant school-based education covering two years, 5-7 years as a method of transition to the primary stage. Students who did this second route would pass directly to the second grade. Compulsory education ranges from 6 to 16 years, four years of primary education comprises (or three years plus one child in the transition

¹¹ GERMANY Eurydice (Länder) (1998), The education system in Germany

cycle), and six years of compulsory secondary education. A semi-compulsory was found in the German system from age 16, would include three years of upper secondary education (do not go to full time).¹²

2.9.1 Kindergarten

The German educational system starts of with the so called Kindergarten. Parents may decide whether their children should attend this institution and for how long before attending primary school at the age of six. At this level of education children are rather to mature socially than academically.

2.9.2 Grundschule

Starting at age six German kids are enrolled to the Grundschule. Similar to the American elementary school Grundschule consists of four years. The children usually have one class teacher that teaches all subjects except for physical education, religious education, music and common art. After completing elementary school children usually get a recommendation of their teacher which school-form to attend after Grundschule depending on their overall academic performance.

2.9.3 German Secondary Education

After elementary school the German school system differs enormously from the American education. Secondary education is what makes the German school system so complicated compared the educational systems of other countries. German parents now have the opportunity of choosing between four different progressing schools, depending on the children's level of academic ability. This decision determines the further vocation in life.

2.9.4 Sonderschule

Sonderschule is a special school created to help mentally and physically disabled children who did not show sufficient progress in elementary school. All of these children get special attention from specially trained teachers.

2.9.5 Hauptschule:

Children with average abilities attend Hauptschule. Hauptschule was created for children who have already shown difficulties with the curriculum during elementary school. children attending this school learn the same things as pupils of other school types, but on a lower level.

¹² Hashimy, S.Q. (2022) India is an incredible place for education - researchgate.net, https://www.researchgate.net/publication/366945319_India_is_an_Incredible_Place_for_Education/link/63b98bc4097c7832ca9ae3bd/download. Available at: https://www.researchgate.net/publication/366945319_India_is_an_Incredible_Place_for_Education (Accessed: February 6, 2022).

After having successfully completed 10th grade children receive the so called Hauptschulabschluss, which enables them to progress with a vocational education or a apprenticeship.

2.9.6 Realschule

German students attending Realschule receive a higher level of education. After successfully completing 10th grade these students receive the Mittlere Reife/Fachhochschulreife, which is an essential certificate to progress to a vocational school, a technical school, a apprenticeship or to attend a Gymnasium.

2.9.7 Gesamtschule

This type of comprehensive school has established itself in the last 25 years of the German educational system because of political reforms. These schools try to compromise between the three traditional school types. They are considered experimental schools. Many federal ministries are thinking of reducing the number of Gesamtschulen to a minimum, because of the enormously high number of students applying for Gesamtschule. According to a complicated credit system students finish the Gesamtschule with certificates corresponding to levels of the tenth grade of the three traditional schools or attain the Abitur.

2.9.8 Gymnasium

Students who are to be over perform more than average and intend to study at university usually choose Gymnasium after Grundschule. These education a minimum of two foreign languages, Latin is still very popular. It strictly focuses on improving academic knowledge. After successfully passing several written and oral exams during 12th and 13th grade students who pass all exams successfully are rewarded with the Abitur.

2.9.9 Berufsschule

These schools are typically German and can not be found the in American school system. This school teaches apprentices the basic skills needed for their future job. This education generally includes a part-time practical and theoretical education.

3.0 RIGHT TO EDUCATION – COMPARATIVE ANALYSIS

3.1 USA

Education in the United States is provided by public and private schools. Public education is universally available, with control and funding coming from state, local, and federal government. Public school curricula, funding, teaching, employment, and other policies are set through locally elected school boards with jurisdiction over school districts. State governments have control over educational standards and standardized

tests for public school systems. Government supported, free public schools for all started being established after the American Revolution, and expanded in the 19th century, The Constitution includes human rights guarantees, but not the right to education. Education is compulsory over an age range beginning somewhere between ages five to eight and ending somewhere between ages sixteen to eighteen, depending on the state. This requirement can be satisfied by educating children in public schools, state-certified private schools, or an approved home school program. In most schools, education is divided into three levels: elementary school, middle or junior high school, and high school. Children are usually divided by age groups into grades, ranging from kindergarten and first grade for the youngest children, up to twelfth grade as the final year of high school. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

3.2 GERMANY

The responsibility for the German education system lies primarily with the States while the federal government plays only a minor role. Optional Kindergarten (nursery school) education is provided for all children between two and six years of age, after which school attendance is compulsory. The system varies throughout Germany because each state decides its own educational policies. Most children, however, first attend Grundschule from the age of six to ten. The freedom of teaching shall not release any person from allegiance to the constitution. Parents and guardians shall have the right to decide whether children shall receive religious instruction. Religious instruction shall form part of the regular curriculum in state schools, with the exception of non-denominational schools. Without prejudice to the state's right of supervision, religious instruction shall be given in accordance with the tenets of the religious community concerned. Teachers may not be obliged against their will to give religious instruction. Children must by law receive education between the ages of 5 (4 in Northern Ireland) and 16. Article 3,5,6,7,9,19, 91b 116 relates to education.

3.3 INDIA

Education in India is provided by the public sector as well as the private sector, with control and funding coming from three levels: central, state, and local. The Indian government lays emphasis on primary education up to the age of fourteen years, referred to as elementary education in India. Education has also been made free for children for 6 to 14 years of age or up to class VIII under the Right of Children to Free and Compulsory Education Act 2009. The Right of Children to Free and Compulsory Education Act or Right to Education Act (RTE), is an Indian legislation enacted by the Parliament of India on 4 August 2009, which describes the modalities of the importance of free and compulsory education for children between 6 and 14 in India under Article 21a of the Indian Constitution. India became one of 135 countries to make education a fundamental right of every child when the act came into force on 1 April 2010. It requires all private schools to reserve 25% of seats to children. The RTE Act is the first legislation in the world that puts the

responsibility of ensuring enrolment, attendance and completion on the Government.

It is the parents' responsibility to send the children to schools in the US and other countries. The Right to Education of persons with disabilities until 18 years of age is laid down under a separate legislation- the Persons with Disabilities Act. A number of other provisions regarding improvement of school infrastructure, teacher-student ratio and faculty are made in the Act.

Table: Right to Education in USA, Germany and India

	USA	Germany	India
Run by	State	State	State
Started	1870	1982	2010
Compulsory Period	13 years	10 years	8 years
Age of Child	5-18 years	6-16 years	6-14 years
Attendance %	99%	90%	99%
System	Co-education	Co-education	Co-education
Articles	Human Rights Act (Article 12) and 14 th Amendment of U.S. Constitution	7	21A
Constitutional promises	Yes	Yes	Yes
Similar rules for entire country	Different in States	Different in States	Yes

Source: Compiled by author

4.0 ROEL OF JUDICIARY

Education is the essential component for the overall development of the human being. It is very foundation of good citizenship and a principle instrument to awaken the child to cultural values in preparing the child for later professional training in and helping him to adjust to the environment surrounding him. Education also nourishes intellectual advancement to develop neither dignity of a person without which there is neither intellectual excellence nor pursuit of happiness.¹³ The right of the children to education is not only the human right by itself but it is also the instrument for realization of the human rights. Education opens up the opportunities to learn and to grow intellectually. It enables and encourages for better participation in the social, cultural and political life of the community. Education makes an individual a respectable citizen of the society. It liberates the individual from any kind of exploitation. Through the universalisation of education the

¹³ Hashimy, S.Q. (2022) India is an incredible place for education - researchgate.net, https://www.researchgate.net/publication/366945319_India_is_an_Incredible_Place_for_Education/link/63b98bc4097c7832ca9ae3bd/download. Available at: https://www.researchgate.net/publication/366945319_India_is_an_Incredible_Place_for_Education (Accessed: February 6, 2022).

community health standards, life expectancy and harmonious relations can be enhanced. Education can also bring social transformation.

4.1 JUDICIAL DEVELOPMENT IN INDIA

From the Seventh Five-Year Plan onwards, the judiciary and the Supreme Court too have played an active role in upholding the rights of the child. The Supreme Court of India has developed the concept of jurisdiction under which any individual can approach the Court with regard to the violation of a fundamental right. The Supreme Court has also modified traditional concepts by allowing groups of persons or organizations to intervene in cases relating to violations of fundamental rights even though they may not have been affected personally in the matter. This concept of 'social action litigation' in India represents an effort to use the legal system to ensure action to realize constitutionally guaranteed rights. Some of the most important examples of social action litigation for children are the following cases, each of which has been a landmark in the process of ensuring children's rights:

- a) Laxmikant Pandey vs. Union of India [AIR (1984) SC 469, AIR (1986) SC 276, AIR (1987) SC 232] on Adoption of Children.
- b) Shila Barse vs. Union of India [AIR (1986) SC 1883, AIR (1988) SC 2211] on Trafficking of Children.
- (c) M.C. Mehta vs. State of Tamil Nadu [JT 1990 SC 263] on Problem of Child Labour.
- (d) Vishal Jeet vs. Union of India [1990 (3) SCC 318] on Problem of Child Prostitution.
- (e) Unni Krishnan vs. State of Andhra Pradesh [1993 (1) SC 645] on Education of Children.
- (f) Gaurav Jain vs. Union of India [1997 (8) SCC 114] on Problems of Prostitution and Children forced into Prostitution.
- (g) Gita Hariharan vs. Reserve Bank of India [(1999) 2 SC 228] on Guardianship
- (h) Centre for Enquiry into Health and Allied Themes (CEHAT) & Others vs. Union of India & Others [2000 SC 301].

Besides the above cited landmark judgments, few other significant cases regarding free and compulsory education in India are Miss Mohini Jain vs State of Karnataka, Nitte Education Trust vs Union of India, Krishnagiri District Private vs State of Tamil Nadu, Social Jurist, A Civil Rights vs Govt. of NCT of Delhi, Adam B. Chaki vs Mr. Paras Kuhad, M. Veera Siva Nagi Reddy vs Osmania University, O.A. Joseph vs Chairman, Board of Governors, Vinay N. Pandya vs Union of India, Maharshi Mahesh Jogi vs State of MP, etc.

A great legal breakthrough was achieved in 1992 when the Supreme Court of India held in Mohini Jain v State of Karnataka, that the 'right to education' is concomitant to fundamental rights enshrined under Part III of the Constitution" and that 'every citizen has a right to education under the Constitution'. The Supreme Court held that a 'right' to education 'flowed from' the enforceable right to life and personal liberty guaranteed by Article 21 of the Constitution, since there could be no 'dignified enjoyment of life', or the realization of other rights, without adequate education. Again in later cases the apex court gave specificity to

the Mohini Jain holding by imposing an obligation upon the State, again flowing from Article 21, to provide free education to all children until the age of fourteen. Furthermore the State responded by amending the Constitution in 2002, and crystallizing the dictum of the Court in a new Article 21A. The RtEA 2009, then, enacted by the government to fulfill its obligations under Article 21A. In the meanwhile, major policy level changes were made under the dictates of the IMF-World Bank Structural Adjustment Programme and the World Bank-funded District Primary Education Programme (DPEP) was introduced in 1994. Under DPEP, the national commitment towards FCE up to 14 years was reduced and primary education for the first five years was introduced. Further, the concept of multi-grade teaching³⁵ and para-teachers was also introduced.

Another substantial historic judgment by the Supreme Court of India in 1993 radically transformed the status of Article 45. In its Unnikrishnan Judgment (1993), the Supreme Court ruled that Article 45 in Part IV has to be read in 'harmonious construction' with Article 21 (Right to Life) in Part III of the Constitution, as Right to Life loses its significance without education. The apex Court made the following powerful interpretation: "It is thus well established by the decisions of this Court that the provisions of Part III and IV are supplementary and complementary to each other and that fundamental rights are but a means to achieve the goal indicated in Part IV. It is also held that the fundamental right must be construed in the light of the directive principles." "The directive principles form the fundamental feature and the social conscience of the Constitution and the Constitution enjoins upon the State to implement these directive principles.... there is no apparent inconsistency between the directive principles contained in Part IV and the fundamental rights mentioned in Part III.... there is no difficulty in putting a harmonious construction that advances the object of the Constitution." "...The right to education flows directly from right to life..." Hence, the Supreme Court declared that Article 45 has acquired the status of a Fundamental Right.

The years that followed have seen how the Indian State allowed the neo-liberal policies to dilute and distort the notion of Fundamental Right emerging from the Unnikrishnan Judgment. We shall shortly examine the deleterious impact of these policies on access to schools and the quality of school education provided therein. The Unnikrishnan Judgment went a step further. It ruled that the Right to Education continues to exist under Article 41 (Part IV) even beyond the age of 14 years but is limited by the State's "economic capacity and [stage of] development". The Constitution is clearly directing the State to envisage the entire sector of education - from kindergarten to higher and professional education in a holistic manner. Any policy to limit, distort or fragment this vision of education amounts to a violation of the Constitution of India which represents people's aspirations from the freedom struggle against imperialism.

From Unnikrishnan Judgment (1993) to 86th Constitutional Amendment (2002) the above historic declaration by the Supreme Court in 1993 made India's ruling class evidently uncomfortable. The central government undertook a series of exercises in the following years designed to extricate itself of the implication of the judgment. The Saikia Committee Report (1997) and the 83rd Constitutional Amendment Bill (August 1997) along with the report of the HRD Ministry-related Parliamentary Committee (November 1997) provide evidence of the clever ways being conceived in order to dilute and distort the concept of the Fundamental

Right to education. However, there was public criticism of these attempts. Intellectuals, activists and grassroots organizations presented memorandum of their concerns to the Parliamentary Committee and organized public debates) engaging leadership of major political parties (e.g. Convention on 'Education as a Fundamental Right' organized by the Central Institute of Education, Delhi University, December 1997). In November 2001, the 86th Constitutional Amendment Bill was presented to the Lok Sabha. This Bill, like its predecessor 83rd Amendment Bill, too, was flawed¹⁴. It was misconceived insofar it (a) excluded almost 17.2% of children up to six years of age from the provision of Fundamental Right to free early childhood care and pre-primary education; (b) restricted the Fundamental Right of even the 6-14 year age group by placing it conditionally in the form of the phrase "as the State may by law, determine" in Article 21 A; this gave the State the instrumentality to arbitrarily restrict, ^ dilute and distort the Fundamental Right given through Article 21 A; (c) shifted the Constitutional obligation towards free and compulsory education from the State to the parents/guardians by making it their Fundamental Duty under Article 51A (k) to "provide opportunities for education" to their children in the 6-14 age group; and (d) reduced, as per the Financial Memorandum attached to the amendment Bill, the State's financial commitment by almost 30 percent of what was estimated by the Tapas Majumdar Committee in 1999; this was achieved through dilution of norms.

There was widespread public criticism of the anti-people character of the above Bill. A rally of 40,000 people, drawn from different parts of the country, at Delhi's Ramlila Grounds held on the day the Bill was discussed in the Lok Sabha (28 November 2001) demanded radical amendments in the Bill. Several Lok Sabha MPs, cutting across party lines, also criticized the Bill. In public mind, it was becoming clear that the hidden agenda of the Bill was not to accord the status of Fundamental Right to elementary education but to snatch away the comprehensive right that the children up to 14 years of age had gained through the Unnikrishnan Judgment. Ignoring the public outcry, however, a consensus was arrived at among all the political parties of varying ideological backgrounds and the Bill was passed in both Houses of the Parliament without even a single dissenting vote. The aforesaid four flaws in the 86th Constitutional Amendment Act (2002) have since provided the basis for legitimizing the lacunae of the Sarva Shiksha Abhiyan (SSA, 2000) and later of the consequent RTE Act 2009 framed under the Article 21 A. It is noteworthy that the new Article 21A introduced through the 86th Amendment is the only Fundamental Right that has been given conditionally. As pointed out above, this Right will be given to the children "as the State may, by law, determine." None of the other Fundamental Rights is tied to such a pre-condition. The restrictions that are placed on some of the other Fundamental Rights [e.g. on Article 19(1)] are not comparable in so far those are not organically made a part of the Fundamental Right and thus leave adequate space for the State to decide whether to apply them or not. While policy level changes had diluted the quality of FCE, the Unnikrishnan Judgement empowered people with a legal claim to FCE. Several public interest litigation petitions were filed in different High Courts to enforce the Unnikrishnan Judgement and acquire admission into schools. This created tremendous pressure on the Parliament and thereafter a proposal for a Constitutional amendment to include the right to education as a fundamental right was made in 1996. Accordingly, the Constitution (Eighty-Third) Amendment Bill was

introduced in the Rajya Sabha in July 1997. The 83rd Amendment proposed that Article 21-A be introduced (fundamental right to education for 6–14 years), former Article 45 be deleted (the then existing directive principle on FCE) and Article 51-A(k) (fundamental duty on parents) be introduced. Between 1997 and 2001, due to change in Governments, the political will that was required to bring about the amendment was absent. In November 2001 however, the Bill was re-numbered as the 93rd Bill and the 83rd Bill was withdrawn. The 93rd Bill proposed that former Article 45 be amended to provide for early childhood care and education instead of being deleted altogether. This Bill was passed in 2002 as the 86th Constitutional Amendment Act. Currently, under Article 21-A of the Constitution, every child between the ages of 6–14 has a fundamental right to education, which the State shall provide ‘in such manner as the State may, by law, determine’. Early childhood care and education (for children in the age group of 0–6 years) is provided for as a directive principle of State Policy under Article 45 of the Constitution

As mentioned earlier, the Constitution of India and the laws enacted over the years have some unique and far-reaching provisions to protect children. Yet, there are laws in which the age of the child is not in consonance with the CRC, which the Government ratified way back in 1992. Besides, the age of the child has been defined differently in different laws. These different age-specifics under different laws not only create a dilemma, but also set the stage for injustice. This is because, whether the same human being is or is not a child depends upon the law that is being invoked in a given case. Moreover, when the laws are in conflict with one another due to diverse definitions, it is but natural a difficult task to decide the ‘best interests of the child’. It is thus necessary that the definition of the term ‘child’ be brought in conformity with the CRC, viz. “below 18 years of age”, by establishing one standard ‘age of majority’. Society for Un-aided Private Schools of Rajasthan vs U.O.I. & Anr. CJI S. H. KAPADIA “we find ourselves in the unenviable position of having to disagree with the views expressed therein concerning the non-applicability of the Right of Children to Free and Compulsory Education Act, 2009 (for short “the 2009 Act”) to the unaided non-minority schools”. Education is a process which engages many different actors : the one who provides education (the teacher, the owner of an educational institution, the parents), the one who receives education (the child, the pupil) and the one who is legally responsible for the one who receives education (the parents, the legal guardians, society and the State). These actors influence the right to education. The 2009 Act makes the Right of Children to Free and Compulsory Education justiciable. The 2009 Act envisages that each child must have access to a neighbourhood school. The 2009 Act has been enacted keeping in mind the crucial role of Universal Elementary Education for strengthening the social fabric of democracy through provision of equal opportunities to all.

The Directive Principles of State Policy enumerated in our Constitution lay down that the State shall provide free and compulsory education to all children upto the age of 14 years. The said Act provides for right (entitlement) of children to free and compulsory admission, attendance and completion of elementary education in a neighbourhood school. The word “Free” in the long title to the 2009 Act stands for removal by the State of any financial barrier that prevents a child from completing 8 years of schooling. The word

"Compulsory" in that title stands for compulsion on the State and the parental duty to send children to school. To protect and give effect to this right of the child to education as enshrined in Article 21 and Article 21A of the Constitution, the Parliament has enacted the 2009 Act. The provisions of this Act are intended not only to guarantee right to free and compulsory education to children, but it also envisages imparting of quality education by providing required infrastructure and compliance of specified norms and standards in the schools. The Preamble states that the 2009 Act stands enacted inter alia to provide for free and compulsory education to all children of the age of 6 to 14 years. The said Act has been enacted to give effect to Article 21A of the Constitution.

Section 3(1) of the 2009 Act provides that every child of the age of 6 to 14 years shall have a right to free and compulsory education in a neighbourhood school till completion of elementary education. Section 3(2) inter alia provides that no child shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing the elementary education. An educational institution is charitable. Advancement of education is a recognised head of charity. Section 3(2) has been enacted with the object of removing financial barrier which prevents a child from accessing education. The other purpose of enacting Section 3(2) is to prevent educational institutions charging capitation fees resulting in creation of a financial barrier which prevents a child from accessing or exercising its right to education which is now provided for vide Article 21A. Thus, sub-Section (2) provides that no child shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing or completing the elementary education.

After very much tardiness in the free and compulsory education policy, The Supreme Court, in response, has come out with its verdict upholding this enactment on 12.04.2012, in *Society for Unaided Private Schools of Rajasthan v. Union of India*.¹⁴ The Court reasoned that "the RTE Act is "child centric and not institution centric", meaning that the provision of education to all children is a priority, irrespective of the fact that it might burden private schools. The court reiterated the importance of Article 21-A, and found that the burden on private schools to satisfy the quota was irrelevant in light of the importance of the right to education. The Court reiterated that the State's primary obligation is to provide for free and compulsory education to all children, particularly those who cannot afford primary education. Although there is a right to establish private schools under Article 19 (1) (g) which guarantees the right to practise any trade or profession, the Court held that this right only exists where the school remains charitable and not for profit. Article 21-A of the Indian Constitution "The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine. "the obligation is on the State to provide free and compulsory education to all children of a specified age. However, the manner in which the said obligation will be discharged by the State has been left to the State to determine by law. Thus, the State may decide to provide free and compulsory education to all children of the specified age through its own schools or through government aided schools or through unaided private schools." The Court held that the State can regulate private schools by imposing reasonable restrictions in the public interest under Article 19(6). The

¹⁴ (2012) 6 SCC 1

Court further concluded that the 25% quota imposed on private schools is in the public interest and is a reasonable restriction for the purposes of Article 19(6). Therefore, the 2009 Act was deemed to be constitutional and enforceable against private schools. However, the Court made a distinction between private schools and private minority schools, established under Article 30 of the Constitution, and held that the government cannot require private minority schools to satisfy a 25% quota. To do so would constitute a violation of the right of minority groups to establish private schools under Article 30. The court reasoned that Article 29(1) of the Constitution protects the right of minorities to conserve their language, script or culture, and Article 30(1) protects their right to establish and administer schools of their choice. Therefore, imposing a quota on such schools would result in changing their character and would therefore violate these rights”

Article 21 is the decision in *Vishaka v. State of Rajasthan*.¹⁵ Here, the court took serious exception to an incident involving the rape of a social worker employed by the state of Rajasthan, and went to the extent of framing guidelines for prevention of sexual harassment in any workplace. The court justified this exercise of judicial power by harping on violation of fundamental rights under Articles 14, 15, 21 and 19(1)(g). However, the court failed to appreciate that the extension of these guidelines to private entities required a separate conceptual enquiry. While dispensing with conceptual analysis, the court showed concern only towards how best sexual harassment could be eradicated from the workplace. Keeping in mind the fact that many organizations are owned by private entities post liberalization, the sweeping application of fundamental rights to non-state actors perhaps brought about a desirable outcome on the facts of this case.

In *State of Himachal Pradesh v State Recognised and Aided Schools Managing Committees*¹⁶ the court held that “the right to education being a fundamental right the State of Himachal Pradesh is under the constitutional obligation to provide the free and compulsory to the children till they complete the age of fourteen years. The obligation does not end thereafter but it is subject to the economic capacity of the state that ordinarily, a child in the country joins the school at the age of 5 years.”

The Karnataka High Court in *Bapuji Educational Association case*¹⁷ has held that “among various types of personal liberty which can be regarded as included in the expression personal liberty used in Art. 21 of the Constitution, education is certainly the foremost. Therefore, Article 21 necessarily includes the right to establish and administer educational institutions of the choice of the citizen or groups of citizens. This is also implicit in Art. 30 of the Constitution certainly, even without Article 30 of the Constitution, the minorities would have the same right under Article 21 and 19(1) (g).¹⁸

¹⁵ Hashimy, S.Q. (2022) India is an incredible place for education

¹⁶ Hashimy, S.Q. (2022) India is an incredible place for education: A cursory glance, uomeprints. figshare. Available at: <http://eprints.uni-mysore.ac.in/17391/> (Accessed: September 6, 2022).

¹⁷ Hashimy, S.Q. (2022) Cultural Horizon of Indian foreign policy: A cursory glance on ICCR, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4080279. Social Sciences Education. Available at: https://www.researchgate.net/publication/359906129_Cultural_Horizon_of_Indian_Foreign_Policy_A_Cursory_Glance_on_ICCR (Accessed: February 6, 2022).

¹⁸ Hashimy, S.Q. (2022) Cultural Horizon of Indian foreign policy: A cursory glance on foundation day of ICCR, SSRN. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4080279 (Accessed: September 6, 2022).

In another case *Pramati Education and Cultural Trust and others v Union of India and Others*¹⁹ the court has interpreted and examined that under section 12(1) (c) read with section 2(n) (iv) of the Right to Education Act an aided school receiving aid and grants, whole or part, of its expenses from the appropriate government or the local authority has to provide free and compulsory education to such proportion of children admitted therein as its annual recurring aid or grants so received bears to its annual recurring expenses, subject to a minimum 25% , thus a minority aided school is put under a legal obligation to provide free and compulsory elementary education to children who need not be children of members of the minority community which has established the school. This makes it clear that the court has changed its earlier stand of accepting the applicability of this Act to the Aided Minority Schools by viewing that it is not correct to say that the Act is applicable to provide the reservation in the minority schools.

The importance of primary education was explained in *Unnikrishnan v. State of Andhra Pradesh*²⁰ as the court relied on Article 45, a directive principle, to hold that the state had a duty, under Article 21, to provide for free and compulsory education of its citizens till the age of fourteen. The difficulty with this approach towards interpreting Article 21 is twofold: one, the state has no real resources to ever guarantee the discharge of its duty and in most cases, the right remains merely one on paper, and two, the state can justify resort to restrictions on private actors in the guise of giving wings to the positive right in question. This is precisely the case with the RTE Act, as the positive right judicially created in *Unnikrishnan and Mohini Jain v. State of Karnataka*,²¹ and constitutionally enshrined through Article 21-A, has been misconstrued to make private entities liable for the fulfilment of this right with little or no heed being paid to the fundamental rights enjoyed by them. This is evident from the best foot put forward by the Union in support of the act, being the submission that Article 21-A, which gives effect to a socio-economic right, would trump other fundamental freedoms and ‘negative’ rights such as the right to carry on business in Article 19(1)(g). The correct response to this submission required an understanding of the history behind Article 21-A as well as the possibility of horizontal application of rights in our constitutional jurisprudence, both of which are strikingly absent in the majority verdict.

In this regard, the dissent by Justice Radhakrishnan traces the events leading to the introduction of Article 21-A, and attempts to draw the majority’s attention to the potential hazards of imposing the state’s duty on private actors. The painstaking review of the progress of this constitutional amendment from the day the Constitution (Eighty-third Amendment) Bill, 1997 was born within the confines of the Department of Education in the Ministry of Human Resource Development, to when it finally got included in Part III, reveals that the initial draft specifically prohibited the state from making ‘any law, for free and compulsory education...in relation to the educational institutions not maintained by the State or not receiving aid out of

¹⁹ Hashimy, Sayed Qudrat (2022): India is an Incredible Place for Education: A Cursory Glance. figshare. Journal contribution. <https://doi.org/10.6084/m9.figshare.21706895.v2>

²⁰ (1993) 1 SCC 645

²¹ Hashimy, S.Q. (2022) India is an incredible place for education

State funds.’ Subsequently, political compulsion prevailed, and it was considered fit to leave it to the judiciary to decide on the scope and width of Article 21-A.

The dissent draws a linkage between the enactment of the RTE Act in 2009 and parallel developments in the field of higher education such as the decisions of the Supreme Court in *T.M.A. Pai Foundation v. State of Karnataka*, *Islamic Academy of Education v. State of Karnataka*, and *P.A. Inamdar v. State of Maharashtra*.²² Analyzing these decisions, the dissent concludes that Parliament was fully aware, at the time of enacting the RTE Act, that private unaided educational institutions of both minority and non-minority status could not be burdened with reservations. This judicial view, according to Justice Radhakrishnan, ought to permeate the debate surrounding Section 12 of the RTE Act, as there was no strong reason to deviate from the same.

Right from the decision in *State of Madras v. VG Row*,²³ the Supreme Court has held that various factors such as the nature of the right alleged to have been infringed, the underlying purpose of the restriction, the extent and urgency of the evil sought to be remedied, the disproportion of the restriction, and the prevailing conditions at the time of imposition of the restriction, would all be relevant in determining the reasonableness of the restriction placed on a fundamental freedom contained in Article 19. Though the restriction in this case related to Article 19(2), the same principle was held applicable to Article 19(6) in *Collector of Customs, Madras v. Nathella Sampathu Chetty*.²⁴ This has in fact prompted the court, in *Om Kumar v. Union of India*,²⁵ to remark that the principle of proportionality has been applied vigorously to state action in India ever since 1950. The doctrine of proportionality essentially involves a balancing of competing interests to ensure a proportionality of ends, as well as securing the proportionality of means by permitting only the least restrictive choice of measures by the legislature or the administrator for achieving the object of the legislation or the purpose of the administrative order. Essentially, there are three important criteria used while applying the doctrine of proportionality. The necessity criterion prevents the state from taking any action that goes beyond what is necessary to achieve its aims, i.e. the method least burdensome to the affected persons. The suitability criterion insists that the means chosen be suitable for achieving those aims. The balancing criterion guarantees a proportionate balance between the burden imposed on affected persons and the purpose sought to be achieved. In determining the reasonableness of any restriction using proportionality, the legislative objective should be sufficiently important to justify such a restriction, the measures designed to meet the legislative objective should be rationally connected to it, and the means used to impair the right or freedom should be no more than is necessary to accomplish the objective. These principles go to show that the nature of the competing interests play a significant role in ascertaining the limit on constitutionally permissible restrictions.

²² Hashimy, S.Q. (2022) India is an incredible place for education

²³ Hashimy, S.Q. (2022) India is an incredible place for education

²⁴ Hashimy, S.Q. (2022) India is an incredible place for education

²⁵ Hashimy, Sayed Qudrat (2022): India is an Incredible Place for Education: A Cursory Glance. figshare. Journal contribution. <https://doi.org/10.6084/m9.figshare.21706895.v2>

*State of Madras v. Shrimati Champakam Dorairajan*²⁶ is a landmark judgment of the Supreme Court of India. This decision led to the First Amendment of the Constitution of India. Supreme Court held that providing such reservations was in infringement of **Article 29(2)** of the **Indian Constitution**. Court held:

“The chapter of Fundamental Rights is sacrosanct and not liable to be abridged by any Legislative or Executive act or order, except to the extent provided in the appropriate Article in Part III. The directive principles of State policy have to conform to and run as subsidiary to the Chapter of Fundamental Rights. In our opinion that is the correct way in which the provisions found in Part III and Part IV have to be understood. However, so long there is no infringement of any Fundamental Right, to the extent conferred by the provisions in Part III, there can be no objection to the State acting in accordance with the directive principles set out in Part IV, but subject again to the Legislative and Executive powers and limitations conferred on the State under different provisions of the Constitution.”²⁷

The right to education was produced under **Article 21**, read with **Article 19(1)(a), (b) and (c)** in 1978 in the case of *Ananda Vardhan Chandel v. Delhi University*.²⁸ The judge observed that the merely disparity in the nature of the rights under Part III and IV of the Constitution is that the Fundamental Rights are ‘natural rights’, which people forever enjoyed and which do not need definite socio-economic conditions to be produced by the State before they can be imposed as is the case with the DPSP which are ‘man-made rights’.

In *Bandhua Mukti Morcha v. Union of India*²⁹, the Supreme Court held that while exploitation of the child must be gradually banned; other substitutes to the child should be developed including providing education, health care, nutrient food, shelter and other means of livelihood with self-respect and dignity of person.

The question of right to free and compulsory education was elevated in the case of *Mohini Jain*³⁰, in 1992, popularly known as “capitation fee case”.

The issues of the case were:

1. Is there a ‘right to education’ guaranteed to the people of India under the Constitution?
2. If so, does the concept of ‘capitation fee’ infract the same?
3. Whether the charging of capitation fee in consideration of admission to educational institutions is arbitrary, unjust, and unfair and as such violates the equality clause contained in **Article 14** of the Constitution?³¹

The division bench of the Supreme Court held that the ‘right to life’ is the compendious phrase for all those rights which the Courts must implement as they are indispensable to the dignified enjoyment of life. Court stated:

²⁶ 1951 AIR 226, 1951 SCR 525

²⁷ Anneli Albi

National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law: National Reports pag 88-15

²⁸ Anand Vardhan Chandel vs University of Delhi, AIR 1978, Delhi 308.

²⁹ Bandhu Mukti Morcha vs Union of State, AIR 1989, SC 802.

³⁰ Mohini Jain vs State of karnatka, 1992, 3 SCC 666.

³¹ Hashimy, Sayed Qudrat (2022): India is an Incredible Place for Education: A Cursory Glance. figshare. Journal contribution. <https://doi.org/10.6084/m9.figshare.21706895.v2>

“The right to education flows directly from right to life. The right to life under **Article 21** and the dignity of an individual are not being assured unless it is accompanied by the right to education. The state is under an obligation to make endeavour to provide educational facilities at all levels to its citizens”.³²

Judges declared that the education in India has never been a commodity for sale. It further settled that “We hold that every citizen has a ‘right to education’ under the Constitution. The State is under an obligation to establish educational institutions to enable the citizens to enjoy the said right. The State may discharge its obligation through State-owned or State-recognised educational institutions. When the State Government grants recognition to the private educational institutions it creates an agency to fulfil its obligation under the Constitution. The students are given admission to the educational institutions – whether State-owned or State recognised in recognition of their ‘right to education’ under the Constitution. Charging capitation fee in consideration of admission to educational institutions is a patent denial of a citizen’s right to education under the Constitution.”

Court considered that the Constitution made it compulsory to give education to all its citizens. This interpretation alone, said the court, would assist the people to differentiate the objectives of dignity, political economic and social justice. They found that charging capitation fee of large sums by institutions of higher education is a disavowal of the right to education.

The Supreme Court observed the accuracy of the verdict given by the court in Mohini Jain in the case of **Unnikrishnan**.³³

The five Judges bench by 3-2 majority partially agreed with the Mohini case decision and held that right to education is fundamental right under **Article 21** of the Constitution as it directly flows from “right to life”. As consider its content, the court partially overruled the Mohini Jain’s decision and held that the right to free education is available only to children until they complete the age of 14 years, then the responsibility of the State to provide education is subject to the limits of its economic capacity and development. The duty created by **Articles 41, 45 & 46** can be executed by the State either by establishing its own institutions or by aiding, recognizing or granting affiliation to private institutions.

Court mentioned that **Article 45** in Part IV has to be read in ‘harmonious construction’ with **Article 21** in Part III of the Constitution, as the impact of right to life is of no use without education. The apex Court made the following interpretation:

“It is thus well established by the decisions of this Court that the provisions of Part III and Part IV are supplementary and complementary to each other and that fundamental rights are but a means to achieve the goal indicated in Part IV. It is also held that the fundamental right must be constructed in the light of the directive principles.”³⁴

³² Article 21 in The Constitution Of India 1949

³³ Uni Krishnan vs State of A.P., 1993,1 SCC 645.

³⁴ Hashimy, Sayed Qudrat (2022): India is an Incredible Place for Education: A Cursory Glance. figshare. Journal contribution. <https://doi.org/10.6084/m9.figshare.21706895.v2>

Court held that children of the nation are an extremely important asset. Their nurture and attentiveness are our responsibility, children's programme should find a noticeable part in our national plans for the development of human resources, so that our children grow up, to become healthy citizens, physically fit, mentally alert and morally healthy; endowed with the skills and enthusiasms needed by society. Equal opportunities for development to all children during the period of development should be our aim, for this would serve our larger purpose of reducing inequality and ensuring social justice.

M.C. Mehta v State of Tamil Nadu & Ors.,³⁵ the Supreme Court stated that Article 45 had obtained the status of a fundamental right following the Constitutional Bench's decision in Unnikrishnan. In addition, the Court said that, it is not necessary that in order to treat a right as fundamental right, it should be expressly stated in Part III of the Constitution: "the provisions of Part III and Part IV are supplementary and complementary to each other". The Court discarded that the rights in the provisions of Part III are superior to the moral claims and aspirations in the provisions of Part IV.

T.M.A Pai Foundation v. State of Karnataka,³⁶ held that the state governments and universities cannot regulate the admission policy of unaided educational institutions run by linguistic and religious minorities, but state governments and universities can identify educational qualifications for students and make rules and regulations to maintain academic principles.

In the case of **Avinash Mehrotra v. Union of India and Others**,³⁷ is whether right to education comprises right to study in quality school which does not pose threat to child safety. The court held that **Articles 21 and 21-A** of the Constitution obliges that India's school children obtain education in safe schools. The court had again stepped into the shoes of legislature by giving the aforementioned directions. The right to education has to move towards growth as merely primary education is made compulsory and free, the secondary education and other higher levels still lag behind. The problem of drop outs even at primary level needs to be solved. It could be considered that the court will always remain the guarantor of fundamental rights such as right to education and will direct the legislature and the executive when such questions are brought before it.

The Court has protected the lives of children by recommending safety majors to be followed and thus it is a challenge to those private management schools which view education only as a business and hardly care about the lives of innocent children. The verdict has further enlarged the burden of government since by providing free education and free mid-day meals will not be adequate, the lives of children are also a condition.

In the landmark judgement of the **Modern School v Union of India**³⁸ the Supreme Court has primarily dealt with the case of the problem of commercialisation of education. The arbitrary fee hike every year by unaided, recognised private schools in Delhi was challenged in this case. The judgement in this case has a revolutionary step to make education in private schools affordable to the common man and to encourage the

³⁵ M.C. Metha vs State of T.N. and others, 1997, SC 699.

³⁶ (2002) 8 SCC 481

³⁷ Avinash Mehrotra v. Union of India and Others

³⁸ (2004) 5SCC 583 p.601

children belonging to the weaker section of the society to get the right to education. In an effort to check the commercialisation of education and to ensure that the private unaided schools do not go away from their social obligations the Apex Court in this case has held that the private unaided schools first have to reserve 20-25 percent of the seats for the children belonging to the weaker section of the society. Secondly, the schools cannot arbitrarily increase their fee without taking the prior approval from the authorities. Although the Apex Court judgement was given in the context of Delhi's school, but it has the implications on the schools in India. Any state choosing to enact the law to evade the commercialisation of education will now have the precedent by this judgement of the Supreme Court.

4.2 JUDICIAL DEVELOPMENT IN USA

Levittown v. Nyquist (NY, 1982), The New York school finance system also relied on local property tax, and several districts with low funding challenged the system. The New York Court of Appeals recognized inequality in the per-pupil spending between districts but concluded that the disparity was not great enough to jeopardize the constitutional right to education

*Brown v. Board of Education (1954)*³⁹ Arguably the most well-known ruling of the 20th century, *Brown* overturned *Plessy v. Ferguson*⁴⁰ and established that “separate educational facilities are inherently unequal.” The Warren Court’s unanimous decision explained that the separate-but-equal doctrine violated the Equal Protection Clause of the 14th Amendment, and ordered an end to legally mandated race-segregated schools. While the *Brown* decision marked only the beginning of a prolonged struggle to achieve actual integration, its impact cannot be understated.

The *Brown* case determined that the “separate but equal” doctrine established by the Court in *Plessy v. Ferguson*, in providing “separate education facilities” based race was, in fact, inherently unequal and violated the equal opportunity and due process clause of the 14th Amendment. As relates to education rights, the *Brown* court held “education is perhaps the most important function of state and local governments ... It is the very foundation of good citizenship” and “such an opportunity where the state has undertaken to provide it, is a right that must be made available to all on equal terms.”

*Engel v. Vitale (1962)*⁴¹ and *Abington School District v. Schempp (1963)*⁴²

This pair of cases shaped the modern understanding of how the Establishment Clause of the First Amendment constrains prayer in public schools. In *Engel*, the Court struck down a New York State rule that allowed public schools to hold a short, nondenominational prayer at the beginning of the school day.

In a 6–1 decision, the Supreme Court held that reciting government-written prayers in public schools was unconstitutional, violating the Establishment Clause of the First Amendment.

³⁹ *Brown v. Board of Education of Topeka (1)*. 18 Jun. 2020.

⁴⁰ 163 US 537 (1896)

⁴¹ *Engel v. Vitale*, 370 U.S. 421 (1962)

⁴² 374 US 203 (1963)

In his opinion for the Court, Justice Black explained the importance of separation between church and state by giving a lengthy history of the issue, beginning with the 16th century in England. He noted that prayer is a religious activity by its very nature, and that prescribing such a religious activity for school children violates the Establishment Clause.

The Court rejected the defendant's arguments that students were not asked to observe any specific established religion, that the traditional heritage of the nation was religious, and that the prayer was voluntary. The Court held that the mere promotion of a religion is sufficient to establish a violation, even if that promotion is not coercive. The Court further held that the fact that the prayer is vaguely-enough worded not to promote any particular religion is not a sufficient defense, as it still promotes a family of religions (those that recognize "Almighty God"), which still violates the Establishment Clause.

The reasoning in *Engel* was also applied in *Schempp*, in which the Court struck down a Pennsylvania policy that required all students to read 10 Bible verses and say the Lord's Prayer at the beginning of each day. While a student could get an exemption with a parent's note, the Warren Court decided that this still amounted to an unconstitutional government endorsement of a particular religious tradition.⁴³

Lemon v. Kurtzman (1971)⁴⁴

Both Pennsylvania and Rhode Island adopted statutes that provided for the state to pay for aspects of non-secular, non-public education. The Pennsylvania statute was passed in 1968 and provided funding for non-public elementary and secondary school teachers' salaries, textbooks, and instructional materials for secular subjects. Rhode Island's statute was passed in 1969 and provided state financial support for non-public elementary schools in the form of supplementing 15% of teachers' annual **salaries**. This case adjudicated a different sort of Establishment Clause challenge, where the controversy dealt with a statute providing financial support for teacher salaries and textbooks in parochial schools.

The appellants in the Pennsylvania case represented citizens and taxpayers in Pennsylvania who believed that the statute violated the separation of church and state described in the First Amendment. Appellant Lemon also had a child in Pennsylvania public school. The district court granted the state officials' motion to dismiss the case. In the Rhode Island case, the appellees were citizens and tax payers of Rhode Island who sued to have the statute in question declared unconstitutional by arguing that it violated the Establishment Clause of the First Amendment. The district court found in favor of the appellees and held that the statute violated the First Amendment.

The Burger Court unanimously decided that this financial aid scheme violated the Establishment Clause and delineated the governing precedent for Establishment Clause cases known as the *Lemon* test. Under *Lemon*, statutes (1) must have a secular legislative purpose; (2) must have primary effects that neither inhibit no

⁴³ Hashimy, S.Q. (2022) India is an incredible place for education: A cursory glance, uomeprints. figshare. Available at: <http://eprints.uni-mysore.ac.in/17391/> (Accessed: September 6, 2022).

⁴⁴ Hashimy, Sayed Qudrat (2022): India is an Incredible Place for Education: A Cursory Glance. figshare. Journal contribution. <https://doi.org/10.6084/m9.figshare.21706895.v2>

advance religion; and (3) cannot foster an “excessive government entanglement with religion.” The Court held that this scheme violated the third prong of the *Lemon* test.⁴⁵

Wisconsin v. Yoder (1972)⁴⁶

Among the litany of public school cases from the Warren and Burger eras is the landmark Free Exercise Clause decision in *Yoder*. Wisconsin mandated that all children attend public school until age 16, but Jonas Yoder, a devoutly religious Amish man, refused to send his children to school past eighth grade. He argued that his children didn’t need to be in school that long to lead a fulfilling Amish life of farming and agricultural work and that keeping his children in school for such a length of time would corrupt their faith. The Court unanimously agreed, saying that the values of public school were in “sharp conflict with the fundamental mode of life mandated by the Amish religion.” It carved out an exception for Yoder and others similarly situated.

The Court held that individual's interests in the free exercise of religion under the First Amendment outweighed the State's interests in compelling school attendance beyond the eighth grade. In the majority opinion by Chief Justice Warren E. Burger, the Court found that the values and programs of secondary school were "in sharp conflict with the fundamental mode of life mandated by the Amish religion," and that an additional one or two years of high school would not produce the benefits of public education cited by Wisconsin to justify the law. Justice William O. Douglas filed a partial dissent but joined with the majority regarding Yoder. Justices Lewis Powell and William Rehnquist took no part in the consideration or decision of the case.⁴⁷

San Antonio Independent School District v. Rodriguez (1972)⁴⁸

Like most U.S. public schools, the San Antonio Independent School District in Texas was funded in part by local property taxes. The District sued the state on behalf of the students in its district, arguing that since property taxes were relatively low in the area, students at the public schools were being underserved due to the lack of funding compared to wealthier districts. Rodriguez, acting on behalf of students whose families reside in poor districts, challenged this funding scheme by arguing that it underprivileged such students because their schools lacked the vast property tax base that other districts utilized. The reliance on assessable property, the school districts claimed, caused severe inter-district disparities in per-pupil expenditures. They argued that the Equal Protection Clause of the 14th Amendment mandates equal funding among school districts, but the Court ultimately rejected their claim.

The Court refused to examine the system with strict scrutiny since there is no fundamental right to education in the Constitution and since the system did not systematically discriminate against all poor people in Texas. Given the similarities between Texas' system and those in other states, it was clear to the Court that the funding scheme was not "so irrational as to be invidiously discriminatory." Justice Powell argued that on the

⁴⁵ *Lemon v. Kurtzman* 18 Jun. 2020

⁴⁶ 406 US 205 (1972)

⁴⁷ *Wisconsin v. Yoder*/70-110. Accessed 18 Jun. 2020

⁴⁸ 411 US 1 (1973)

question of wealth and education, "the Equal Protection Clause does not require absolute equality or precisely equal advantages."⁴⁹

In the case of *Tinker v. Des Moines (1969)*⁵⁰ At the height of the Vietnam War, students in the Des Moines Independent Community School District in Iowa wore black armbands to school as an expression of their dissatisfaction with U.S. foreign policy. The district passed a rule prohibiting the armbands as part of a larger dress code, and students challenged the ban as a violation of the Free Speech Clause of the First Amendment. The principals of the Des Moines school learned of the plan and met on December 14 to create a policy that stated that any student wearing an armband would be asked to remove it, with refusal to do so resulting in suspension. On December 16, Mary Beth Tinker and Christopher Eckhardt wore their armbands to school and were sent home. The following day, John Tinker did the same with the same result. The students did not return to school until after New Year's Day, the planned end of the protest.

Through their parents, the students sued the school district for violating the students' right of expression and sought an injunction to prevent the school district from disciplining the students. The district court dismissed the case and held that the school district's actions were reasonable to uphold school discipline. The U.S. Court of Appeals for the Eighth Circuit affirmed the decision without opinion

The Court agreed with the students and struck down the ban, saying that the school has to prove that the conduct or speech "materially and substantially interferes" with school operations in order to justify the ban. This case is notable for its impact on First Amendment jurisprudence regarding distinctions between conduct and speech, as well as for its extension of free speech protections to students. The Supreme Court held that the armbands represented pure speech that is entirely separate from the actions or conduct of those participating in it. The Court also held that the students did not lose their First Amendment rights to freedom of speech when they stepped onto school property. In order to justify the suppression of speech, the school officials must be able to prove that the conduct in question would "materially and substantially interfere" with the operation of the school. In this case, the school district's actions evidently stemmed from a fear of possible disruption rather than any actual interference.⁵¹

Whereas in the *New Jersey v. TLO (1985)*⁵² T.L.O. was a high school student. School officials searched her purse suspecting she had cigarettes. The officials discovered cigarettes, a small amount of marijuana, and a list containing the names of students who owed T.L.O. money. T.L.O. was charged with possession of marijuana. Before trial, T.L.O. moved to suppress evidence discovered in the search, but the Court denied her motion. The Juvenile and Domestic Relations Court of New Jersey, Middlesex County found her guilty and sentenced her to probation for one year. On appeal, the Superior Court of New Jersey, Appellate Division affirmed the denial of the motion to suppress evidence. The New Jersey Supreme Court reversed, holding that

⁴⁹ Hashimy, Sayed Qudrat (2023): Cultural Horizon of Indian Foreign Policy: A cursory Glance on Foundation Day of ICCR. figshare. Journal contribution. <https://doi.org/10.6084/m9.figshare.21923787.v1> ⁵⁰ 393 US 503 (1969)

⁵¹ *Tinker v. Des Moines Independent Community School District.* 1968/21. Accessed 18 Jun. 2020

⁵² 469 US 325 (1985)

the exclusionary rule of the Fourth Amendment applies to searches and seizures conducted by school officials in public schools.

After the original oral argument in March of 1984, the Supreme Court restored the case to the calendar for reargument. In addition to the previously argued question, the Court requested that the parties brief and argue the additional question of whether the assistant principal violated the Fourth Amendment in opening T.L.O.'s purse

The Court heard a reargument on October 02, 1984. The Court held that while the Fourth Amendment's prohibition on unreasonable searches and seizures applies to public school officials, they may conduct reasonable warrantless searches of students under their authority notwithstanding the probable cause standard that would normally apply to searches under the Fourth Amendment. The Court held that the search of T.L.O.'s purse was reasonable under the circumstances.⁵³

In the case of *United States v. Lopez* (1995)⁵⁴ In 1990, President George H.W. Bush signed the Gun-Free School Zones Act, which prohibited the possession of firearms in designated school zones. Alfonzo Lopez, a 12th-grade high school student, carried a concealed weapon into his San Antonio, Texas high school. He was charged under Texas law with firearm possession on school premises. The next day, the state charges were dismissed after federal agents charged Lopez with violating a federal criminal statute, the Gun-Free School Zones Act of 1990. The act forbids "any individual knowingly to possess a firearm at a place that [he] knows...is a school zone." Lopez was found guilty following a bench trial and sentenced to six months' imprisonment and two years' supervised release.

The court decided that possession of a gun in a local school zone is not an economic activity that might, through repetition elsewhere, have a substantial effect on interstate commerce. The law is a criminal statute that has nothing to do with "commerce" or any sort of economic activity.⁵⁵

Parents Involved in Community Schools v. Seattle (2007)⁵⁶

In 2003, the Supreme Court ruled in *Gratz v. Bollinger* and *Grutter v. Bollinger* that race-based classifications, as used in affirmative-action policies, must be "narrowly tailored" to a "compelling government interest," like diversity. In light of this, the Seattle School District established a tiebreaker scheme for admission to competitive public schools in the district, in which racial diversity played a role in the ultimate decision. Applying these precedents to K-12 education, the Circuit Court found that the tiebreaker scheme was not narrowly tailored. The District then petitioned for an "en banc" ruling by a panel of 11 Ninth Circuit judges. The en banc panel came to the opposite conclusion and upheld the tiebreaker. The majority ruled that the District had a compelling interest in maintaining racial diversity. Applying a test from *Grutter*, the Circuit Court also ruled that the tiebreaker plan was narrowly tailored, because 1) the District did not

⁵³ New Jersey v. T.L.O. Accessed 18 Jun. 2020.

⁵⁴ 514 US 549 (1995)

⁵⁵ *United States v. Lopez*. 1994/93-12602020.

⁵⁶ 551 US 701 (2007)

employ quotas, 2) the District had considered race-neutral alternatives, 3) the plan caused no undue harm to races, and 4) the plan had an ending point.

The policy was challenged, and the Supreme Court was tasked with deciding if the Equal Protection Clause had any bearing on the case. It determined that its earlier decisions for college affirmative action do not apply to public schools and that racial diversity is not a compelling government interest for public school admission.

The Court applied a "strict scrutiny" framework and found the District's racial tiebreaker plan unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. Chief Justice John Roberts wrote in the plurality opinion that "The way to stop discrimination based on race is to stop discriminating based on race." The Court acknowledged that it had previously held that racial diversity can be compelling government interest in university admissions, but it ruled that "[t]he present cases are not governed by *Grutter*." Unlike the cases of higher education, the District's plan involved no individualized consideration of students, and it employed a very limited notion of diversity ("white" and "non-white"). The District's goal of preventing racial imbalance did not meet the Court's standards for constitutionally legitimate use of race: "Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'" The plans also lacked the narrow tailoring that is necessary for race-conscious programs. The Court held that the District's tiebreaker plan was targeted toward demographic goals and not toward any demonstrable educational benefit from racial diversity. The District also failed to show that its objectives could not have been met with non-race-conscious means. In a separate opinion concurring in the judgment, Justice Kennedy agreed that the District's use of race was unconstitutional but stressed that public schools may sometimes consider race to ensure equal educational opportunity. Furthermore, they held that the denial of admission to a public school because of a student's race in the interest of achieving racial diversity is unconstitutional.⁵⁷

5.0 JUDICIAL DEVELOPMENT IN GERMANY

5.1 GERMAN LAW CODIFICATIONS

5.1.1 German Constitution

Article 7 of the German Basic Law,⁵⁸ the country's constitution, provides that the country's entire school system is under the supervision of the national government. That article has been interpreted to guarantee the school as an organized institution with a minimum duration that conveys certain learning and educational goals in a variety of subjects,⁵⁹ but does not guarantee an individual's right to education. When the Basic Law was adopted in 1949, it was agreed that education, although supervised by the national government, would fall within the competencies of the individual German states,⁶⁰ unlike under the Weimar Constitution of

⁵⁷ *Parents Involved in Community Schools v. Seattle School District No.*

⁵⁸ Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law].

⁵⁹ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court [Decisions of the Federal Constitutional Court] 40, 77.

⁶⁰ Basic Law art. 30.

1919. The Basic Law does not specify how the individual German states have to implement the responsibility of the states concerning education.

5.1.2 B. German State Constitutions

As the Basic Law places education within the competency of the sixteen German states, the states may vary as to whether education is recognized in state constitutions. Most states have chosen to codify a right to education in their constitution; others have opted to codify it in a statute. The German State of Lower Saxony is among one the states that have included a right to education in the constitution. Article 4, paragraph 1 of its constitution states that “each person has a right to education.”⁶¹ Thuringia,⁶² Brandenburg,⁶³ Berlin,⁶⁴ and Bremen⁶⁵ have almost identical wording in their constitutions. In Saxony, article 102, paragraph 1 of the Constitution provides that the state guarantees the right to “school education.”(Verfassung des Freistaates Sachsen vom)⁶⁶ In addition, article 7, paragraph 1 of the Constitution of Saxony lists the right to education as one of the state objectives.

Other German states have codified norms with slightly different wording in their constitutions that guarantee a right to education only concerning children or adolescents in accordance with their abilities. Article 11, paragraph 1 of the Constitution of Baden-Württemberg, for example, provides that “every young person has a right to education and training in accordance with his or her abilities without regard to origin or economic situation.”(Verfassung des Landes Baden-Württemberg) ⁶⁷ A similar wording can be found in the constitutions of North Rhine-Westphalia (Verfassung für das Land Nordrhein-Westfale), ⁶⁸ Rhineland Palatinate (Verfassung für Rheinland-Pfalz),⁶⁹ Saarland (Verfassung des Saarlandes),⁷⁰ and Saxony-Anhalt (Verfassung des Landes Sachsen-Anhalt).⁷¹ Bavaria limits the right to education to residents of Bavaria (Verfassung des Freistaates Bayern).⁷²

5.1.3 German State Statutes

⁶¹ Hashimy, Sayed Qudrat (2022): Cultural Horizon of Indian Foreign Policy: Acursory Glance on Foundation Day of ICCR. figshare. Journal contribution. <https://doi.org/10.6084/m9.figshare.21923787.v1>

⁶² Verfassung des Freistaats Thüringen [Constitution of the Free State of Thuringia], Oct. 25, 1993, Gesetz- und Verordnungsblatt für den Freistaat Thüringen [Thür GVBl.] [Thuringia Gazette of Laws and Ordinances] 1993,

⁶³ Verfassung des Landes Brandenburg [Constitution of the State of Brandenburg], Aug. 20, 1992, Gesetz- und Verordnungsblatt für das Land Brandenburg [Bbg GVBl.] [Brandenburg Gazette of Laws and Ordinances] I at 298, as amended, art. 29English, .

⁶⁴ Hashimy, Sayed Qudrat (2022): India is an Incredible Place for Education: A Cursory Glance. figshare. Journal contribution. <https://doi.org/10.6084/m9.figshare.21706895.v2>

⁶⁵ Landesverfassung der Freien Hansestadt Bremen [State Constitution of the Free Hanseatic City of Bremen],.

⁶⁶ Hashimy, Sayed Qudrat (2022): Cultural Horizon of Indian Foreign Policy: Acursory Glance on Foundation Day of ICCR.

⁶⁷ Verfassung des Landes Baden-Württemberg [Constitution of the State of Baden-Württemberg], Nov. 11, 1953,].

⁶⁸ Verfassung für das Land Nordrhein-Westfalen [Constitution for the State of North Rhine]- 1950

⁶⁹ Hashimy, Sayed Qudrat (2022): Cultural Horizon of Indian Foreign Policy: Acursory Glance on Foundation Day of ICCR.

⁷⁰ Verfassung des Saarlandes [Constitution of Saarland], Dec. 15, 1947.

⁷¹ Hashimy, Sayed Qudrat (2022): Cultural Horizon of Indian Foreign Policy: Acursory Glance on Foundation Day of ICCR.

⁷² Hashimy, Sayed Qudrat (2022): India is an Incredible Place for Education: A Cursory Glance. figshare. Journal contribution. <https://doi.org/10.6084/m9.figshare.21706895.v2>

The German state of Hesse codified the right to education in its School Act.⁷³ Section 1 provides that “every young person has a right to education.” The right to “school education for everyone” is also guaranteed in the School Act of Mecklenburg-West Pomerania.⁷⁴ Schleswig-Holstein’s School Act states that the mission of the school is determined by the right of a young person to receive an education and training based on his or her abilities, skills, and liking.⁷⁵ A similar provision can be found in the School Act of Hamburg.⁷⁶

In the German states of Brandenburg and Lower Saxony, which incorporated the right to education in their constitutions, courts are occasionally called upon to decide if the right to education includes a right to attend a specific school.

A case that was decided by the Constitutional Court of the State of Brandenburg (which has jurisdiction only over cases involving interpretation of that state’s constitution) involved an applicant who had just finished elementary school and received an evaluation that she was generally qualified to attend a *Gymnasium*, a high school that qualifies the student to attend university afterward (Verfassungsgericht des Landes Brandenburg).⁷⁷ There are other types of high schools in Germany that end after the ninth or tenth year and therefore do not qualify the student to attend a university.

The applicant applied to two different *Gymnasiums* located in her school district. Both schools had recently reduced the number of students that they admitted. She received rejection letters from both schools. The schools argued that they had more applicants than places and determined that other students were more qualified than her. She did not apply to any other schools and was therefore assigned to attend a high school that would not have qualified her to attend a university later. The applicant sued and claimed that the rejection by the schools of her choice violated her constitutional right to education.⁷⁸

The Constitutional Court of Brandenburg held that the rejection by the two schools did not violate the applicant’s right to education. It elaborated that the right to education only guarantees equal access to existing schools, but does not require the schools or the state to create additional capacity or to establish a certain type of school. The Court further ruled that as long as the admission process was based on objective criteria applicable to all students, which was the case here, the right to education was not violated.⁷⁹

In a similar case, the Administrative Court of Hannover in Lower Saxony, interpreting the Lower Saxony Constitution and a statute implementing the constitutional right to education, held that a right to attend a specific school exists if three cumulative criteria are fulfilled.⁸⁰ According to the Court, the right to education includes a right to attend a specific school if

⁷³ Hashimy, Sayed Qudrat (2022): Cultural Horizon of Indian Foreign Policy: A cursory Glance on Foundation Day of ICCR. figshare. Journal contribution. <https://doi.org/10.6084/m9.figshare.21923787.v1>

⁷⁴ Hashimy, Sayed Qudrat (2022): India is an Incredible Place for Education: A cursory Glance. figshare. Journal contribution. <https://doi.org/10.6084/m9.figshare.21706895.v2>.

⁷⁵ Schleswig-Holsteinisches Schulgesetz [Schulgesetz – SchulG] School Act

⁷⁶ Hamburgisches Schulgesetz [HmbSG] [School Act for Hamburg], Apr. 16, 1997, für Hamburg Gazette of Laws .

⁷⁷ Verfassungsgericht des Landes Brandenburg [VerfGBbg] [Constitutional Court of the State of Brandenburg]

⁷⁸ Hashimy, Sayed Qudrat (2022): Cultural Horizon of Indian Foreign Policy: A cursory Glance on Foundation Day of ICCR.

⁷⁹ *Id.* paras. B.II.1. & 2.

⁸⁰ Verwaltungsgericht Hannover [VG Hannover] [Administrative Court of Hannover], Aug. 6, 2008,

- (1) the school that was picked by the parents is the only available school of that type in the school district;
- (2) the selected school has available capacity; and
- (3) there are no provisions in the education law that would prohibit the admission of the student in this particular case.⁸¹

The Administrative Court of Hannover elaborated that the capacity of a school is only exhausted if the admission of one more student would prevent the school from fulfilling its educational mandate due to a shortage of personnel or resources.⁸² In the case under consideration, the court ruled that the fact that the number of students that the school had established as the maximum admissions number was reached was insufficient for a rejection of the plaintiff. The school would have been obligated to prove that the admission of one more student would keep it from fulfilling its educational mandate. The Court, therefore, ruled in favor of the plaintiff.⁸³

6.0 CONCLUSION

To conclude, the flexibility of U.S education system is its greatest strength. The flexibility allows the students to know better of themselves regarding their talent, capabilities and interest, which is hard to find in Indian education system. Thus, US education system is freedom oriented and Indian system is forced. In India, all the decisions are taken by parents and they are not allowed to think independently. Hence, flexibility should be allowed. There is a need to promote the 'creativity' in Indian education. Graduate programs in the US are far ahead of most other countries due to the critical mass they have and the fact that they attract the best students and faculty from all over the world. In spite of many good things in US education system, one must be careful regarding the youth are being more obsessed towards sex, alcohol, drugs, violence, etc. in USA, because India is taking up western culture very fast and once this culture occupy India, it will not take much time to ruin the education and culture.

Education remained a neglected area of state policy with universalization of elementary education continuing to be a distant goal. Efforts from educationists, academics and civil society groups that focused on a rights based approach finally yielded results in 2002, when the 86th constitutional amendment was passed by parliament and Article 21A, which makes right to education a fundamental right, was included in the constitution. In doing so, it put the Right to Education on par with the Right to Life stated in Article 21. Article 21 A states: “the state shall provide free and compulsory education to all children of the age of 6 to 14 years as the state may, by law determine”. The RTE Act also aims at reaching to the unreached and disadvantaged groups with providing specific provision of Free and Compulsory Education for every child who is above six years of age and has not yet been admitted to any school or though admitted, could not complete his or her education, then, he or she shall be admitted in a class appropriate to his or her age. To accomplish this task there is a provision in RTE Act for Special Training for such children in order to be at

⁸¹ *Id.* para. 18.

⁸² *Id.* para. 21.

⁸³ *Id.* para. 29.

par with others. With all its aims, vision mission one can say that Right to education act is the act for future. In nutshell, In India, the RTE was enacted to provide education to all students in the country. The study found that local transportation is a problem in rural India, and this assumes greater significance when it comes to education. In many places, good schools are outside the villages, and this can deter parents from sending their kids to such schools. As compared to urban areas, government schools are not as spread out in rural areas, and this discourages parents to spend on their kids' education. Most rural schools lack good infrastructure, including well-trained teachers. This leads to poor quality of education being imparted. In urban areas, the number of schools per person is higher, as is the quality of education delivery—due to a relative lack of infrastructure, including reliable electricity. Also, it has been seen that schools in rural India have numerous non-academic issues to deal with, including staff and infrastructure, and thus are not fully capable of focusing on student development. Whereas the German education system is different in many ways from the ones in other countries, but it produces high-performing students. The overwhelming majority of German students attend public schools. Children aged three to six may attend kindergarten. After that, school is compulsory for nine or ten years. From grades 1 through 4 children attend elementary school (Grundschule), where the subjects taught are the same for all. Then, after the 4th grade, they are separated according to their academic ability and the wishes of their families and attend one of three different kinds of schools: Hauptschule, Realschule, or Gymnasium. There are several different types of private schools in Germany. These schools usually charge tuition and may offer varied courses leading to the German Abitur as well as other diplomas and certificates after studies. The education system of Germany was found to be efficient because as the country lacks natural resources, its highly educated workforce constitutes Germany's most important economic asset; thus, education and vocational training enjoy high prestige and financial and administrative support. There are other concerns in the United States regarding children's rights. The American Academy of Adoption Attorneys is concerned with children's rights to a safe, supportive and stable family structure. Their position on children's rights in adoption cases states that, "children have a constitutionally based liberty interest in the protection of their established families, rights which are at least equal to, and we believe outweigh, the rights of others who would claim a 'possessory' interest in these children." Other issues raised in American children's rights advocacy include children's rights to inheritance in same-sex marriages and particular rights for youth. Education in the United States follows a pattern similar to that in many systems. Early childhood education is followed by primary school (called elementary school), middle school, secondary school (called high school), and then postsecondary (tertiary) education. Postsecondary education includes non-degree programs that lead to certificates and diplomas plus six-degree levels: associate, bachelor, first professional, master, advanced intermediate, and research doctorate. The U.S. system does not offer a second or higher doctorate but does offer post-doctorate research programs. Adult and continuing education, plus special education, cut across all educational levels.

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